Supreme Court, U.S.
FILED
MAY 27 1993
OFFICE OF THE CLERK

92-1905

No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

RESIDENT COUNCIL OF ALLEN PARKWAY VILLAGE, AN UNINCORPORATED ASSOCIATION, ON BEHALF OF ITS MEMBERS, AND WESSIE SCYRUS,

Petitioners,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL M. ESSMYER
MICHAEL M. ESSMYER & ASSOCIATES
4300 Scotland
Houston, Texas 77007
(713) 868-1111
(713) 863-9934 [FAX]

Attorneys for Petitioners

ALPHA LAW BRIEF CO. • HOUSTON, TEXAS 77081 • 1-800-9001 • (713) 981-9000

45 pp

QUESTIONS PRESENTED

In reversing the district court's order granting permanent injunctive relief and remanding the order with instructions to dismiss the petitioners' complaints, the Fifth Circuit ordered the district court to dismiss a cause of action against a party who had not even appeared before the appellate court. Further, in reversing the district court's order, the Fifth Circuit held that the Frost-Leland Amendment to the Department of Housing and Urban Development - Independent Agencies Appropriations Act of 1988 did not create federally enforceable rights within the meaning of § 1983 nor did the statute itself create an implied right of action against a state agency.

1. Did the lower federal court err in reversing and remanding the district court's April 4, 1991 order back to the district court with instructions that the petitioners' complaint be dismissed against a party who had not even appealed?

2. Does the Frost-Leland Amendment provide the Resident Council and Tenants of Allen Parkway Village with federally enforceable rights within the meaning of § 1983?

3. Does the Frost-Leland Amendment itself create an implied right of action against a state agency?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

I.

THIS COURT SHOULD DECIDE WHETHER THE LOWER FEDERAL APPELLATE COURT ERRED IN REVERSING AND REMANDING THE DISTRICT COURT'S ORDER BACK TO THE DISTRICT COURT WITH INSTRUCTIONS THAT THE PETITIONERS' COMPLAINT BE DISMISSED AGAINST A PARTY WHO HAD NOT EVEN APPEALED 6

II.

THE COURT SHOULD DECIDE WHETHER THE FROST-LELAND AMENDMENT

IMPOSES A "BINDING OBLIGATION" ON THE STATES THAT GIVES RISE TO FEDERALLY ENFORCEABLE RIGHTS . . 11

III.

THE COURT SHOULD DETERMINE WHETHER THE FROST-LELAND AMENDMENT ITSELF CREATED AN IMPLIED RIGHT OF ACTION 12

IV.

CONCLUSION 13

APPENDIX A 1a

TABLE OF AUTHORITIES

FEDERAL CASES

Page

Machella v. Cardenas, 659 F.2d 650,652 (5th Cir. 1981) 9, 10

Assoc. Against Discrimination in Employment, Inc. v. City of Bridgeport, 710 F.2d 69, 73-74 (2nd Cir. 1983) 10

Browder v. Director, Illinois Department of Corrections, 434 U.S. 257, 264, 98 S.Ct. 556. 566 54 L. Ed.2d 521 (1978) 7

Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d (1975) 12, 13

Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 80, 98 S.Ct. 2620, 2634, 57 L.Ed.2d 595 (1978) 9

Maine v. Thiboutot, 448 U.S. 1, 4, 100 S.Ct. 2502, 65 L.Ed. 2d 555 (1979) 11

Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 19, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981) 11

Suter v. Artist M., __ U.S. __,
112 S.Ct. 1360, 118 L.Ed.2d 1 (1992) 12

United States v. City of Miami, Fla.,
664 F.2d 435, 445 (5th Cir. 1981) (en banc)
(plurality opinion) 10

Warth v. Seldin, 422 U.S. 490,
499, 509, 95 S.Ct. 2197, 2205,
2210, 45 L.Ed.2d 343 (1975) 9

*Wilder v. Virginia Hospital
Association*, 496 U.S. 498,
509, 110 S.Ct. 2510, 2517,
110 L.Ed.2d 455 (1990) 11

*Wright v. City of Roanoke
Redevelopment and Housing
Authority*, 479 U.S. 418, 423,
107 S.Ct. 766, 93 L.Ed.2d 781 (1987) 11

FEDERAL STATUTES AND RULES

24 CFR Part 868 (1979) 3

42 U.S.C. § 1437 p 3

42 U.S.C. § 1983 6

Department of Housing and Urban Development -
Independent Agencies Appropriations Act of 1988 3

FEDERAL RULES OF APPELLATE PROCEDURES

Fed.R.App.P. 3(a) 7
Rule 3(c) 7

FEDERAL RULES OF CIVIL PROCEDURE

Fed.R.Civ.P.R. 23 10

OTHER AUTHORITIES

9 *Moore's Federal Practice*,
§ 203.06 (2d ed. 1980) 9

NO. _____

_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

_____

RESIDENT COUNCIL OF ALLEN PARKWAY VILLAGE, AN UNINCORPORATED ASSOCIATION, ON BEHALF OF ITS MEMBERS, AND WESSIE SCYRUS,

Petitioners,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.,

Respondents.

_____

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

_____

PETITION FOR WRIT OF CERTIORARI

_____

Petitioners respectfully request this Court to grant the Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on January 13, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit reversing the district court's order and remanding the order back to the district court with instructions to dismiss the petitioners' complaint is reported in 980 F.2d 1043 (5th Cir. 1983), and is reprinted in the Appendix hereto, at p. 1a (references to the Appendix bound with this petition are styled "__a.").

The April 4, 1991 order of the United States District Court for the Southern District of Texas is unreported and is reprinted at p. 37a.

JURISDICTION

The decision of the Court of Appeals, reversing the District Court's order, was announced on January 13, 1993. A timely motion for rehearing was denied on February 26, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Allen Parkway Village (APV) is a public housing project built with federal funds in the 1940's. As originally built, it contained 1,000 units consisting of two and three-story buildings set on 37 acres of land. The project is closely situated to downtown Houston and the Fourth Ward, Houston's oldest African-American Community. APV is owned and operated by the Housing Authority of the City of Houston (HACH), a state agency established to provide low income person with decent, safe, sanitary and affordable housing not available in the private market. Under the terms of HACH's long term annual contributions contract with the

United States Department of Housing and Urban Development, HACH receives federal funds to subsidize low-income housing.

In 1979, under the Public Housing Urban Initiation Program, HUD allocated $10 million to HACH for the modernization of APV. The funds were specifically reserved for HACH's use. *See* 24 CFR Part 868 (1979). During the next five years, HACH used approximately $1.5 million of the federal modernization funds.

In August of 1984, HACH submitted, pursuant to the for HACH procedures set forth in 42 U.S.C. § 1437 p, an application to HUD to demolish APV. Petitioners responded by filing a brief with the Secretary of HUD opposing demolition. Petitioners asserted that the application for demolition did not meet the requirements of the federal statute and that demolition of APV was not in the interests of the low income residents of Houston.

In 1987, the United States Congress passed, and the President signed, the Department of Housing and Urban Development - Independent Agencies Appropriations Act of 1988, Public Law No. 100-202, 101 Stat. 1329-213. Section 415 of this Act ("Frost-Leland Amendment") provides:

> None of the funds appropriated by this Act or any other Act for any fiscal year shall be used for demolishing ... Allen Parkway Village, 1600 Allen Parkway in Houston, Texas.

In 1989, the Resident Council of Allen Parkway Village (Resident Council) and two individual residents of APV (collectively, petitioners) filed suit against HACH and HUD in federal district court. By filing suit, petitioners sought to enforce the Frost-Leland Amendment and to enjoin both HACH and HUD from using federal funds to prepare, revise, advance, review or approve the HACH demolition application.

On April 13, 1989, the district court granted the request for a preliminary injunction against HACH. No preliminary injunction was requested against HUD because HUD had agreed to advise the Resident Council on the progress of HACH's demolition application.

On December 5, 1989, HUD informed HACH by letter that the application to demolish APV was being returned unapproved. In that same letter, HUD reminded HACH that it had a legal obligation to operate the development as public housing. HUD also informed HACH that federal funds were available for modernization of APV and set a deadline of January 19, 1990, for HACH to inform HUD regarding its decision on future development. As requested by HUD, HACH submitted its plan for developing APV on January 12, 1990. The HACH development plan called for either new construction or comprehensive rehabilitation of up to 150 units. The remaining units were "slated for removal." In March 1990, HUD requested that HACH furnish, within 90 days, a formal application for approval with respect to any long term modernization, demolition, and/or disposition of APV. HACH never responded to HUD's request.

On April 4, 1991, the district court granted the permanent injunction sought by petitioners.(p. 25a) In its order the district court reaffirmed its prior definition of the phrase "for demolishing" in the Frost-Leland Amendment as including studying, preparing, or taking steps toward demolition. (p. 43-44a)

The district court also:

(1) prohibited HACH from spending any federal funds on any activity that "promotes, advances, or explores the total demolition of APV," including activity designed to establish that rehabilitation and renovation of part or all of APV are useless;

(2) ordered HACH to furnish an accounting of all expenditures of federal funds allocated to HACH since 1979;

(3) ordered HACH to present, within 60 days, a plan to use federally appropriated funds for the repair and upgrading of all or part of APV;

(4) granted the permanent injunction requested to the full extent of the Frost-Leland Amendment;

(5) ordered HUD to set aside the funds remaining from the $10 million appropriation to HACH in 1979 and further ordered that those funds not be transfered to other projects;

(6) ordered HACH to submit, under separate cover, an accounting of all expenditures of funds set aside for the repair and renovation of APV as well as all rent subsides that are now and have been allocated and paid to HACH for the APV apartments; and

(7) ordered all discovery associated with the 42 U.S.C. § 1983 claims be completed within 90 days. (pp. 44-45a)

On May 2, 1991, HACH filed a timely notice of appeal from the district court's order. *HUD did not file a notice of appeal.* However, the Court of Appeals did grant HUD's uncontested motion to be realigned as an appellant for purposes of briefing.

On January 13, 1993, the Court of Appeals reversed the district court's order and remanded with instructions to dismiss the petitioner's complaints. In doing so, the Court stated that the residents of APV had not stated a claim for which relief could be granted and were not, at that time, entitled to judicial review under the Administrative Procedures Act.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD DECIDE WHETHER THE LOWER FEDERAL APPELLATE COURT ERRED IN REVERSING AND REMANDING THE DISTRICT COURT'S ORDER BACK TO THE DISTRICT COURT WITH INSTRUCTIONS THAT THE PETITIONERS' COMPLAINT BE DISMISSED AGAINST A PARTY WHO HAD NOT EVEN APPEALED.

The appellate court's opinion correctly finds that, while HACH timely filed a notice of appeal, "HUD did not file any such notice" of appeal from the district court's order. (p. 16a). Furthermore, HACH did not include the

ruling against HUD as a point of its own written appeal. Under Fed.R.App.P. 3(a), an appeal shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. A timely notice of appeal containing the components set forth in Rule 3(c) is a **MANDATORY PRECONDITION** to exercise of jurisdiction by a Court of Appeals. (emphasis added). *See Browder v. Director, Illinois Department of Corrections*, 434 U.S. 257, 264, 98 S.Ct. 556. 566 54 L.Ed.2d 521 (1978). The Court of Appeals goes on to correctly hold that HUD is *not* an "appellant" before the appellate court, and that the notice of appeal filed by HACH does not rest the appellate court with jurisdiction over an appeal by HUD. (p. 16a). Therefore, the Appellate Court has grievously erred by ordering the district court to dismiss a cause of action against a party (HUD) who has not even appeared before the appellate court.

Even under the Court of Appeals factual and legal finding that "HACH has standing to attack the validity of all portions of the district court's April 4, 1991, order, including the part that is nominally directed to HUD" (a finding that petitioners dispute), the appellate court might have jurisdiction to "*change*" the district court's order as it affects HACH, but the appellate court has absolutely no jurisdiction to either change the order as to the non-appealing party HUD, or to dismiss the order in its totality as to the non-appealing party HUD.

Despite this lack of jurisdiction, and the appellate court's statement that HUD was *not* an appellant, the language of the opinion clearly shows that the appellate court

treated HUD as a direct appellant. For instance, but not by way of limitation, the appellate court held:

> "HACH and HUD argue that the district court's April 4, 1991 order granting permanent injunctive relief against *them* cannot stand." (p. 20a) (emphasis added).
>
> "Because HUD is a federal agency acting under color of federal law, we hold that Plaintiffs have not stated a claim against it under §1983." (p. 26a)
>
> "Thus, we hold that Congress did not intend to create a private right of action against HUD when it passed the Frost-Leland Amendment." (p. 13a)
>
> "The Plaintiffs do not seek review of any final agency action by HUD." (p. 33a)
>
> "HUD's internal and informal administrative interpretation of the Frost-Leland Amendment is not final agency action." (p. 34a)
>
> "We reverse the district court's April 4, 1991 order awarding permanent injunction relief against ... HUD and remand the case with instructions that the Plaintiffs' complaint be dismissed." (p. 36a)

Indeed, the appellate court throughout the opinion uses analysis and the verbiage "against HUD", when HUD is not even a party to the appeal.

The United States Supreme Court has held that ordinarily, a party may not assert the rights of others. The United States Supreme Court has narrowly limited the circumstances in which one party will be given standing to assert the legal rights of another party. *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 80, 98 S.Ct. 2620, 2634, 57 L.Ed.2d 595 (1978). Even when a party has alleged injury sufficient to meet the "case or controversy" requirement, the United States Supreme Court has held that the party generally must assert only his own legal rights and interests, and cannot rest the party's claim to relief on the legal rights or interests of third parties, and this is true even if the party is asserting the rights or legal interests of others only in order to obtain relief from injury to themselves. *See Warth v. Seldin*, 422 U.S. 490, 499, 509, 95 S.Ct. 2197, 2205, 2210, 45 L.Ed.2d 343 (1975).

Indeed, the Fifth Circuit rule is that only the party aggrieved by a district court ruling has standing to appeal. *See Machella v. Cardenas*, 659 F.2d 650,652 (5th Cir. 1981)(where a disaster loan, non-proper class representative could not urge non-appealing class members position on appeal). In *Marchella*, the Fifth Circuit also cited 9 *Moore's Federal Practice*, § 203.06 (2d ed. 1980). Moore's states that standing to appeal rests on two requirements (1) the appellant must be privy to the record; and
(2) the appellant must be aggrieved by the order appealed from.

While one who is aggrieved by a finding against another may sometimes be allowed to intervene for the purpose of prosecuting an appeal to protect his own rights (*See* 9 *Moore* at § 203.06), that party *must* file a notice of appeal from the judgment which he seeks to appeal within the time prescribed in Rule 4(a). *See* 9 *Moore* at § 203.06. In the present case, HACH, even assuming it was an

aggrieved party by the ruling against HUD, never gave written notice of appeal as to the findings against HUD, and did not intervene nor ask to be placed in the stead of HUD at the time the notice of appeal was given.

It remains to be determined if HACH actually was aggrieved in any manner by the ruling against the non-appealing HUD. A litigant is not entitled to have the court decide the merits of an issue the party raises unless the party can show some reason for arguing that the challenged action has caused the party cognizable injury. *Assoc. Against Discrimination in Employment, Inc. v. City of Bridgeport*, 710 F.2d 69, 73-74 (2nd Cir. 1983). Presently, HACH has not presented any evidence as to how the district court order that HUD set aside such funds as remain from the $10,000-,000 approved appropriation and not transfer those funds to other projects adversely affects HACH.

In *United States v. City of Miami, Fla.*, 664 F.2d 435, 445 (5th Cir. 1981) (en banc)(plurality opinion), it appears that the Fifth Circuit rule is *not* to overturn a judgment as between two non-appealing parties, but to effect the judgment only as far as it affected a non-settling party. Thus, except in class actions under Fed.R.Civ.P.R. 23, an appellant may not appeal in behalf of others who have chosen not to intervene or not to appeal. *See Machella v. Cardenas* at 927. Consequently, HACH cannot challenge provisions of the injunction that only affect HUD and the petitioners, nor can HACH have the injunction lifted against HUD, nor the case dismissed against HUD.

II.

THE COURT SHOULD DECIDE WHETHER THE FROST-LELAND AMENDMENT IMPOSES A "BINDING OBLIGATION" ON THE STATES

THAT GIVES RISE TO FEDERALLY ENFORCEABLE RIGHTS

In *Maine v. Thiboutot*, 448 U.S. 1, 4, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1979), the United States Supreme Court held that 42 U.S.C. § 1983 provides a cause of action for violations of federal statutes as well as the Constitution. However, § 1983 will not provide a cause of action for violation of a federal statute unless the federal statute in question creates enforceable rights, privileges, or immunities within the meaning of § 1983. *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 423, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987).

A federal statutory provision creates an enforceable federal right under § 1983 if the provision (1) was intended to benefit the putative Plaintiffs, (2) imposes a binding obligation on the states, and (3) the right asserted is not so amorphous that courts are unable to adequately enforce it. *Wilder v. Virginia Hospital Association*, 496 U.S. 498, 509, 110 S.Ct. 2510, 2517, 110 L.Ed.2d 455 (1990).

The Court of Appeal's holding that the Frost-Leland Amendment did not impose a binding obligation on the state agency was in error. *See Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 19, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981). The provision of the amendment sought to be enforced are set forth in *mandatory* rather than precatory language. *Wilder*, 110 L.Ed.2d at 460. Further, the provisions of federal funds appropriated by the Act are conditioned on compliance with the amendment, i.e. that "*[n]one* of the funds appropriated . . . *shall* be used for demolishing . . Allen Parkway Village." (emphasis added). The intent of Congress in passing this amendment was clearly to protect the specified public housing projects from demolition. *See Wilder*, 110 L.Ed.2d at 461 (In determining whether a federal enactment imposes a binding obligation on

a state, courts look to the amendment background and legislative history).

A finding that the statute in question does not impose a binding obligation on the state is also contrary to the statutory language, which prohibits *any* use of the appropriated funds to demolish APV or other specified housing projects. This prohibition is to apply equally to both federal and federally subsidized state action. To hold otherwise would render the prohibition virtually meaningless.

III.

THE COURT SHOULD DETERMINE WHETHER THE FROST-LELAND AMENDMENT ITSELF CREATED AN IMPLIED RIGHT OF ACTION

Once the Court of Appeals had determined that the Frost-Leland Amendment created no federally enforceable rights under § 1983, it "quickly" disposed of petitioners' arguments that the statute itself created an implied right of action against a state agency. (p. 28a) Relying on *Suter v. Artist M.*, __ U.S. __, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992), the Court reasoned that "where Congress did not intend to create federally enforceable rights against a state agency, Congress could not have impliedly created a private cause of action against such an agency." (p. 28a).

As already discussed, *see supra* Part II, the lower appellate court erred in holding that the Frost-Leland Amendment did not create any federally enforceable rights. Thus, the four-factor *Cort* test should be employed to determine whether Congress intended to imply a private right of action for the statutory rights violated. *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d (1975).

When applying the four *Cort* factors to the facts of the present case, it is unmistakable that Congress intended to create an implied right of action under the Frost-Leland Amendment. This is particularly true because of the clear congressional intent that federal funds not be used, directly or indirectly, for the demolition of APV.

IV.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

MICHAEL M. ESSMYER & ASSOCIATES
4300 Scotland
Houston, Texas 77007
(713) 868-1111
(713) 863-9934 [FAX]

ATTORNEY FOR PETITIONERS

APPENDIX A

RESIDENT COUNCIL OF ALLEN PARKWAY VILLAGE et al.,
Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, et al., Defendants-Appellants.

No. 91-2454.

United States Court of Appeals,
Fifth Circuit.

Jan. 13, 1993.

Rehearing Denied Feb. 26, 1993.

Residents of federally subsidized low-income housing project sued to prevent proposed demolition of project. The United States District Court for the Southern District of Texas, Kenneth M. Hoyt, J., granted permanent injunctive relief, and state housing authority appealed. The Court of Appeals, King, Circuit Judge, held that: (1) federal statute prohibiting use of federal funds to demolish certain federally subsidized low-income housing projects did not create private cause of action in favor of residents of project, (2) state housing authority was not "agency" whose decisions could be reviewed under federal Administrative Procedure Act; and (3) Department of Housing and Urban Development's (HUD's) internal interpretation of what constituted

"demolishing" was not "final agency action" reviewable, under the Administrative Procedure Act.

Reversed and remanded.

1. Federal Courts

Controversy becomes "moot" when, as result of intervening circumstances, there are no longer adverse parties with sufficient legal interests to maintain litigation.

See publication Words and Phrases for other judicial constructions and definitions.

2. Federal Courts

Controversy can become "moot" when issues presented are no longer live, or when parties lack a legally cognizable interest in outcome.

3. Injunction

Mere voluntary cessation of allegedly illegal conduct does not "moot" case in which injunctive relief is sought.

4. Injunction

Mere fact that housing authority's application to demolish public housing project had been returned unapproved by Department of Housing and Urban Development (HUD) did not "moot" residents' action to enjoin housing authority from using public funds to conduct demolition studies and to file additional demolition applications, where HUD's decision with respect to housing

authority's first application did not necessarily foreclose possibility that subsequent demolition application might be approved.

5. Federal Courts

Timely notice of appeal containing components required by Federal Rule of Appellate Procedure is mandatory precondition to exercise of jurisdiction by Court of Appeals. F.R.A.P. Rule 3(a,c), 28 U.S.C.A.

6. Federal Courts

Notice of appeal filed by state housing authority from district court order enjoining it from using public funds to submit further applications to Department of Housing and Urban Development (HUD) for demolition of low income housing project did not vest Court of Appeals with jurisdiction over appeal by HUD.

7. Federal Courts

Court of Appeals did not have jurisdiction over appeal by federal agency that did not timely file notice of appeal merely because agency was party below and realigned itself for purpose of filing brief in support of state housing authority's appeal.

8. Amicus Curiae

Motion by party who had not timely filed notice of appeal, requesting that it be realigned as appellant for purposes of briefing, would be construed as motion to file amicus brief. F.R.A.P. Rule 29, 28 U.S.C.A.

9. Amicus Curiae

Amicus Curiae generally cannot expand scope of appeal to implicate issues that have not been presented by parties to appeal.

10. Federal Civil Procedure

To establish Article III standing, party seeking judicial resolution of dispute must show more than presence of disagreement; party must also show that he personally has suffered some actual or threatened injury as result of defendant's putatively illegal conduct. U.S.C.A. Const. Art. 3, § 1 et seq.

11. Federal Civil Procedure

To establish Article III standing, party must show that he is not just concerned bystander, but that he has direct stake in outcome of litigation. U.S.C.A. Const. Art. 3, § 1 et seq.

12. United States

State housing authority had sufficient stake in district court order directing Department of Housing and Urban Development (HUD) to set aside money previously appointed to authority to have Article III standing to attack validity of order U.S.C.A. Const. Art. 3 § 1 et seq.

13. Civil Rights

To state valid claim under § 1983, plaintiff must allege violation or rights secured by Constitution or laws of

United States, and demonstrate that alleged deprivation was committed by person acting under color of state law. 42 U.S.C.A. § 1983.

14. Civil Rights

Not every violation of federal statute under color of state law is redressable under § 1983; action under § 1983 will not lie where Congress has foreclosed such an action in statute allegedly violated, or where statute in question does not create enforceable rights, privileges or immunities within meaning of § 1983. 42 U.S.C.A. § 1983.

15. Civil Rights

Rider to appropriations bill, which prohibited use of federal funds to demolish certain enumerated low-income housing projects, did not create any private rights in favor of residents of enumerated project, such as might support § 1983 claim against housing authority for allegedly violating statute. 42 U.S.C.A. § 1983.

16. Action

As general rule, courts are reluctant to infer congressional intent to create private rights under appropriations measures.

17. Civil Rights

Federal officials, acting under color of federal rather than state law, are not subject to suit under § 1983. 42 U.S.C.A. § 1983.

18. Action

To establish implied private right of action under federal statute, plaintiff has burden of demonstrating that Congress affirmatively contemplated private enforcement when it passed statute; there is presumption against any such intent.

19. Civil Rights

When federal statute creates federally enforceable rights, privileges or immunities, there is presumption that violations of statute are redressable under § 1983, unless defendant establishes that Congress intended to withdraw such remedy. 42 U.S.C.A. § 1983.

20. Action

In deciding whether Congress intended to create private right of action under federal statute, court must consider: whether plaintiff are within class for whose especial benefit statute was enacted; whether there is evidence of explicit or implicit legislative intent to create or deny private remedy; whether private remedy is consistent with or necessary to purposes underlying statutory scheme; and whether federal remedy is inappropriate because subject matter involves area that is primarily of concern to states.

21. Action

Federal statute providing that federal funds payable to state housing authority in connection with low income housing project could not be used to demolish project did not create private right of action in favor of residents of project against housing authority for allegedly violating statute in using funds to file demolition applications.

22. Action
United States

Federal statute providing that federal funds payable to state housing authority in connection with low-income housing project may not be used to demolish project did not create private right of action against Department of Housing and Urban Development (HUD) where statute contained no indication of Congressional intent to create private cause of action and did not expressly waive HUD's sovereign immunity.

23. Administrative Law and Procedure
United States

State housing authority that operated federally subsidized low-income housing project was not "agency," whose actions could be reviewed under the federal Administrative Procedure Act. 5 U.S.C.A. § 702.

See publication Words and Phrases for other judicial constructions and definitions.

24. Administrative Law and Procedure

Judicial review may be sought under general review provisions of the Administrative Procedure Act only of final agency claims. 5 U.S.C.A. §§ 551(13), 704.

25. Administrative law and Procedure

Whether agency action is "final," within meaning of general review provisions of Administrative Procedure Act, is question which turns on several pragmatic factors: whether challenged action is definitive statement of agency's position; whether action has status of law with penalties for noncom-

pliance; whether impact on plaintiff is direct and immediate; and whether immediate compliance is expected. 5 U.S.C.A. §§ 551(13), 704.

See publication Words and Phrases for other judicial constructions and definitions.

26. Administrative Law and Procedure
United States

Department of Housing and Urban Development's (HUD's) internal and informal administrative interpretation of Frost-Leland Amendment, which prohibited use of federal funds in order to terminate certain federally subsidized low-income housing projects, was not "final agency action" of which review could be sought under general review provisions of Administrative Procedure Act. 5 U.S.C.A. §§ 551(13), 704.

Gabrielle R. McDonald, Arthur L. Walker, Jr., Austin, Tex., and Cindy A. Lopez, Griggs & Harrison, Houston, Tex., for Housing Authority of City of Houston, et al.

Mark W. Pennak and Michael Jay Singer, Attys., Appellate Staff, Civ. Div. U.S. Dept. of Justice, Washington, D.C. for U.S. Housing & Urban Development.

Cornelius D. Perry; and Fred Orleans, Mirrer and Orleans, Houston, Tex., for plaintiffs-appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before **KING, JOHNSON** and **DUHÉ**, Circuit Judges.

KING, Circuit Judge:

This appeal arises from a lawsuit filed by residents of Allen Parkway Village, a Houston public housing project, to prevent the proposed demolition of that project. The Housing Authority of the City of Houston appeals the district court's April 4, 1991 order awarding permanent injunctive relief against it and the United States Department of Housing and Urban Development. Because we conclude that the residents of Allen Parkway Village have not stated a claim for which such relief could be granted and are not, at this time, entitled to judicial review under the Administrative Procedure Act, we reverse the district court's April 4, 1991 order granting permanent injunctive relief and remand with instructions to dismiss the residents' complaint.

1. BACKGROUND

Allan Parkway Village (APV), which was built in the 1940's is one of Houston's oldest public housing projects. It is owned and operated by the Housing Authority of the City of Houston (HACH), a state agency established to provide low income persons with safe and affordable housing. *See* TEX.LOC.GOV'T CODE ANN. § 392.011 (Vernon 1988). Under the terms of HACH's long term annual contributions contract with the United States Department of Housing and Urban Development (HUD), HACH receives federal funds to subsidize low-income housing.

In 1979, under the Public Housing Urban Initiative Program HUD provided $10 million to HACH for the modernization of APV. The funds were specifically reserved for HACH's use. *See* 24 C.F.R. Part 868 (1979). During

the next five years, HACH used approximately $1.5 million of the federal modernization funds.

In August 1984, pursuant to the procedures set forth in 41 U.S.C. § 1497p, HACH submitted an application to HUD to demolish APV. According to HACH, demolition of APV was necessary because the housing project was "obsolete," " physically deteriorated," and "located in a neighborhood which is blighted." The demolition application also contained, as required by § 1437p, a relocation plan for residents and a replacement housing plan to compensate for the loss of APV's 1,000 housing units.

Before HUD had acted on HACH's application to demolish APV and before any demolition had occurred, on December 17, 1987, Congressmen Marvin Frost and Mickey Leland introduced an amendment to an appropriations bill for HUD. The Frost-Leland Amendment, which was passed by Congress, provides as follows:

> None of the funds provided by this Act or any other Act for any fiscal year shall be used for demolishing George Loving Place, at 3320 Rupert Street, Edgar Ward Place, at 3901 Holystone, Elmer Scott Place, at 2600 Morris, in Dallas, Texas, or *Allen Parkway Village, 1600 Allen Parkway, in Houston Texas.*

United States Department of Housing and Urban Development — Independent Agency Appropriations Act. 1988, Pub.L. No. 100-102, Title IV, § 415, 101 Stat. 1329-213 (emphasis added).

Two years after the passage of the Frost-Leland Amendment, on January 2, 1989, the Resident Council of Allen Parkway Village (Resident Council) and two individual

residents of APV (collectively, Plaintiffs) filed suit against HUD and HACH in federal district court. The purpose of the suit was to enforce the Frost-Leland Amendment and to prevent both HUD and HACH from using federal funds to "prepare, revise, and advance" the APV demolition application. The Plaintiffs asserted jurisdiction under 28 U.S.C. § 1331 and sought declaratory and injunctive relief under the Frost-Leland Amendment itself, under 42 U.S.C. § 1983, and under the Administrative Procedure Act, 5 U.S.C. § 501 et seq.

The district court granted the Plaintiffs' request for a preliminary injunction against HACH on April 13, 1989. No preliminary injunction was requested against HUD, however, because HUD had agreed to keep the Plaintiffs advised of the progress of HACH's demolition application. In granting the preliminary injunction against HACH, the district court first held that the Plaintiffs had "standing" under 42 U.S.C. § 1983 to bring this action. The district court noted that implicit in 42 U.S.C. § 1437p(b) "is the right of the tenant, or the tenant council, to bring suit to protect the status of residents who would be affected by any demolition and displacement" of a public housing facility. The district court further reasoned that, once it is established that a plaintiff is a resident of a public housing facility, "that tenant may enforce any federal statutory right appertaining to that status and the facility, particularly where the activity complained of falls into an area protected or regulated by statute." The district court then defined the phrase "for demolishing" in the Frost-Leland Amendment as referring not only to the physical act of destruction, but also "to the process by which destruction is commenced and finished." *Id.* Finally, because it concluded that the Plaintiffs were likely to prevail on their § 1983 claim, the district court granted their application for a temporary injunction.

On December 5, 1989, HUD returned HACH's application for the demolition of APV as unapproved. In the letter returning the application, HUD reminded HACH that it had a legal obligation to operate the development as public housing. HUD also informed HACH that federal funds were available for modernization of APV and set a deadline for HACH to decide on future development. As HUD had requested, HACH submitted its plan for developing APV on January 12, 1990. The plan called for either new construction or comprehensive rehabilitation of 150 units. The remaining units, according to the plan submitted by HACH, were slated for removal." After this plan was submitted, HUD requested that HACH take immediate action (i.e., within 90 days) to furnish a formal application for approval with respect to any long term modernization, demolition and/or disposition of APV. HACH never responded to HUD's request.

The district court granted the permanent injunction at issue in this appeal on April 4, 1991. In its order, the district court first held that, despite HUD's decision to return HACH's application for demolition as unapproved, the case was not moot. The district court specifically stated that "[t]here are live issues in this case as long as HACH fails to use allocated federal funds for their intended purposes, maintenance and renovation of APV, and simultaneously insists on spending the allocated funds on studies that are designed to defeat those purposes." The district court then proceeded to the merits of the Plaintiffs' claim for declaratory and injunctive relief and reaffirmed its prior definition of the phrase "for demolishing" in the Frost-Leland Amendment as including studying, preparing, or taking steps towards demolition. Ultimately, the district court:

(1) prohibited HACH from spending any federal funds on any activity that "promotes, ad-

vances, or explores the total demolition of APV," including activity designed to establish that rehabilitation and renovation of part or all of APV are useless;

(2) ordered HACH to furnish an accounting of all expenditures of federal funds allocated to HACH since 1979;

(3) ordered HACH to present, within 60 days, a plan to use federally appropriated funds for the repair and upgrading of all or part of APV;

(4) granted the permanent injunction requested to the full extent of the Frost-Leland Amendment;

(5) ordered HUD to set aside the funds remaining from the $10 million appropriation to HACH in 1979;

(6) ordered HACH to submit, under separate cover, an accounting of all expenditures of funds set aside for the repair and renovation of APV as well as all rent subsidies that are now and have been allocated

and paid to HACH for the APV apartments; and

(7) ordered all discovery associated with the 41 U.S.C. § 1983 claims be completed within 90 days.

On May 2, 1991, HACH filed a timely notice of appeal from the district court's order. HUD did not file any such notice. On August 27, 1991, however, this court granted HUD's uncontested motion to be realigned as an appellant in this court for purposes of briefing.

II. JURISDICTIONAL PROBLEMS

Before we review the district court's April 4, 1991 order granting permanent injunctive relief against HACH and HUD, we address two jurisdictional problems. The first jurisdictional problem concerns the district court's power to award injunctive and declaratory relief. It requires us to decide whether HUD's decision to return the APV demolition application as unapproved renders the controversy between the Plaintiffs and HUD and HACH moot. The second such problem concerns our appellate jurisdiction, and in particular, our ability to review that portion of the district court's orders directed at HUD.

A. The Effect of HUD's Decision to Return the Demolition Application

In district court, HUD and HACH contended that the Plaintiffs' request for declaratory and injunctive relief was moot. They argued that the passage of time, and particularly, HUD's decision to return the APV demolition application as unapproved, eliminated any justiciable controversy. For

the following reasons, we agree with the district court that there is still a live controversy between the Plaintiffs and HUD and HACH under Article III of the Constitution.

[1,2] A controversy becomes moot where, as a result of intervening circumstances, there are no longer adverse parties with sufficient legal interests to maintain the litigation. *Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 133, 40 L.Ed. 293 (1859). Mootness can arise in one of two ways: First, a controversy can become moot "when the issues presented are no longer 'live.'" *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 1951, 23 L.Ed.2d 491 (1969). A controversy can also become moot when "the parties lack a legally cognizable interest in the outcome." *Id.*

[3,4] In this case, HUD's decision to return HACH's demolition application does not render the Plaintiffs' request for injunctive relief moot. "Mere voluntary cessation of allegedly illegal conduct does not moot a case" in which injunctive relief is sought. *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203, 89 S.Ct. 361, 364, 21 L.Ed.2d 344 (1968). And, although "[a] case might become moot if subsequent events ma[k]e it absolutely clear that the allegedly wrongful behavior could not reasonable be expected to recur," *id.*, such is not the case here. HUD's decision to return HACH's demolition application does not prevent HACH from subsequently filing another such application. Nor does HUD's decision with respect to the first application foreclose the possibility that a subsequent demolition application might be approved by HUD. In short, HUD's decision to return HACH's demolition application as unapproved simply does not "ma[k]e it absolutely clear that the allegedly wrongful behavior could not reasonable be expected to recur." Accordingly, there was, at the time the district court granted permanent injunctive relief, and still is,

a live controversy between the Plaintiffs and HUD and HACH.

B. The Effect of HUD's Failure to File a Notice of Appeal

The more complicated jurisdictional question, in our view, concerns HUD's failure to file a timely notice of appeal. As we have already noted, HACH filed a timely notice of appeal, but HUD did not. HUD subsequently moved to be realigned as an "appellant" for purposes of briefing and was permitted to file a brief and argue before this court. After explaining HUD's status before this court, we must decide whether HACH may properly appeal the portion of the district court's order directed to HUD.

1. *HUD's status in this appeal*

[5] Under the Federal Rules of Appellate Procedure, an appeal "shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4," FED.R.APP.P. 3(a). The notice of appeal must "specify the party or parties taking the appeal" and must "designate the judgment, order or part thereof appealed from." *Id.* 3(c). A timely notice of appeal containing the components set forth in Rule 3(c) is a mandatory precondition to exercise of jurisdiction by a court of appeals. *See Browder v. Director, Illinois Dep't of Corrections*, 434 U.S. 257, 264 98 S.Ct. 556, 560, 54 L.Ed.2d 521 (1978); *Nelson v. Foti*, 707 F.2d 170, 171 (5th Cir. 1983).

[6,7] Because HUD did not timely file and was not otherwise named in a notice of appeal, HUD is not an "appellant" before this court. The notice of appeal filed by HACH, which specified only that HACH desired to appeal from the district court's April 4, 1991 order, does not vest

this court with jurisdiction over an appeal by HUD, *See Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317, 108 S.Ct. 2405, 2409, 101 L.Ed.2d 285 (1988) (court of appeals had no jurisdiction over appeal by party who did not file the functional equivalent of a notice of appeal and was never named or otherwise designated in the notice of appeal filed by others). Nor does this court have jurisdiction over an appeal by HUD merely because HUD was a party below and "realigned" itself for purposes of filing a brief in support of HACH's appeal. *See Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 778 F.2d 1365, 1369-70 (9th Cir. 1985) (Federal Rules of Appellate Procedure do not mirror Supreme Court Rules under which "[a]ll parties to the proceeding in the court from whose judgment the appeal is being taken" are deemed to be parties to the appeal absent written notification to the contrary); *cf. Diamond v. Charles*, 476 U.S. 54, 63, 106 S.Ct. 1697, 1704, 90 L.Ed.2d 48 (1986) (status as a "party" under Supreme Court Rules does not equate with status as an appellant; rather, "[t]o appear before the Court as an appellant, a party must file a notice of appeal, the statutory prerequisite to invoking [the] Court's jurisdiction.").

[8,9] HUD's status before this court is more akin to the status of an amicus curiae. HUD has an interest in HACH's appeal, but is not a party to the appeal. *See New England Patriots Football Club, Inc. v. University of Colorado*, 592 F.2d 1196, 1198 n. 3 (1st Cir. 1979) (an amicus is one who, not as a party, gives information of some matter of law in regard to which the court is doubtful or mistaken); *see also Funbus Systems, Inc. v. State of California Public Utilities Comm'n*, 801 F.2d 1120, 1125 (9th Cir. 1986) ("[T]here is no rule that amici must be totally disinterested."). Under this view, HUD's motion to be realigned as an appellant for purposes of briefing may be construed as a motion to file an amicus brief under Rule 29 of the Federal

Rules of Appellate Procedure. Because Rule 29 provides that a federal agency such as HUD may file an amicus brief even without consent of all parties or leave of court, *see* FED.R.APP.P. 29, we may properly consider the arguments raised by HUD. We are constrained only by the rule that an amicus curiae generally cannot expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal.[1] *See Christopher M. v. Corpus Christi Indep. School Dist.*, 933 F.2d 1285, 1292 (5th Cir. 1991) (amicus curiae ordinarily cannot raise an issue that has not been raised by the parties absent exceptional circumstances) (citing *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n. 2, 101 S.Ct. 1559, 1562 n. 2, 67 L.Ed.2d 732 (1981)). *But compare Teague v. Lane*, 489 U.S. 288,300, 109 S.Ct. 1060, 1069, 103 L.Ed.2d 334 (1989) (addressing question of retroactivity of habeas petitioner's claim despite fact that it was raised only in an amicus brief).

2. *HACH's standing to appeal portions of the order directed at HUD*

The real problem with HUD's failure to file a notice of appeal is one of HACH's standing. While most of the district court's April 4, 1991 order is directed at HACH, at least one part is specifically directed at HUD. In particular, the district court ordered HUD to set aside the funds remaining from the $10 million appropriation to HACH in 1979. We must therefore determine whether HACH has standing to appeal from this portion of the district court's April 4, 1991 order. If HACH does not have standing to assert that the district court erred in ordering HUD to set aside the remain-

---

1. In this regard, we note that HUD, in its brief to this court, has not attempted to expand the scope of HACH's appeal. Instead, it has confined its arguments to those raised by HACH.

der of the 1979 modernization funds, then this portion of the district court's order must stand. In the words of the Supreme Court, "[b]y not appealing the judgment below, [HUD] indicated its acceptance of that decision..." *Diamond*, 476 U.S. at 63, 106 S.Ct. at 1704.

[10,11] The Article III standing requirement stems from the limited power of federal courts to decide only "cases" and "controversies." To establish Article III standing, a party seeking judicial resolution of a dispute must show more than the presence of a disagreement. *Diamond*, 476 U.S. at 62, 106 S.Ct. at 1703. He must also show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct...." *Id.* (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 1608, 60 L.Ed.2d (1979)). In other words, he must show that he is not just a "concerned bystander", *see United States v. SCRAP*, 412 U.S. 669, 687, 93 S.Ct. 2405, 2416, 37 L.Ed.2d 254 (1973), but someone with "a direct stake in the outcome," *see Sierra Club v. Morton*, 405 U.S. 727, 740, 92 S.Ct. 1361, 1369, 31 L.Ed.2d 636 (1972).

[12] We conclude that HACH has standing to attack the validity of all portions of the district court's April 4, 1991 order, including the part that is nominally directed to HUD. The money the district court ordered HUD to set aside is, after all, money that has already been appropriated to HACH. In its April 4 order, then, the district court effectively instructed HUD to withhold or recover money that had already been appropriated to HACH. Thus, HACH is more than just a "concerned bystander" with respect to the district court's instructions to HUD: HACH has a direct monetary stake in attacking this portion of the district court's order. Accordingly, HUD's failure to file a timely notice of appeal, while it precludes HUD from being an appellant in

this court, has no effect on our ability to reach the merits of all the complaints leveled by HACH against the district court's April 4, 1991 order.

III. THE DISTRICT COURT'S ORDER GRANTING INJUNCTIVE RELIEF

HACH and HUD argue that the district court's April 4, 1991 order granting permanent injunctive relief against them cannot stand. They argue initially that the Plaintiffs have failed to state a claim for which such relief may be granted. In this regard, they argue that the Plaintiffs (a) have not stated a claim for which relief can be granted under 42 U.S.C. § 1983, (b) have not stated a claim for which relief can be granted under the Frost-Leland Amendment itself, and (c) are not entitled to judicial review under the Administrative Procedure Act. HACH and HUD further contend that, even if the Plaintiffs had stated a claim for which relief could be granted, the district court erred in interpreting the Frost-Leland Amendment to prohibit the expenditure of federal funds for studying, preparing, or taking steps towards demolition. Because we agree that the Plaintiffs have failed to state a claim for which relief can be granted and are not entitled to judicial review under the Administrative Procedure Act, we do not address the district court's interpretation of the Frost-Leland Amendment.

A. Have the Plaintiffs' Stated a Claim for Which Relief Can Be Granted under Section 1983?

[13] On appeal the Resident Council maintains that the Plaintiffs have stated a claim for which relief can be granted under 42 U.S.C. § 1983. We disagree. To state a valid claim under § 1983, a plaintiffs must (1) allege a violation of rights secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation

was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48, 108 S.Ct. 2250,2254, 101 L.Ed.2d 40 (1988) (citing cases). With regard to their claim against HACH, the Plaintiffs have not alleged a violation of "rights secured by the Constitution or laws of the United States." And, with regard to their claim against HUD, the Plaintiffs cannot show that HUD has acted "under color of state law."

1. *Against HACH?*

Pointing to the Supreme Court's decision in *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1979), the Resident Council argues that the Plaintiffs have stated a claim for which relief may be granted against HACH. The Resident Council first notes that, according to the Court in *Thiboutot*, § 1983 provides a cause of action for violations of federal statutes under color of state law. The Resident Council reasons that, because the Frost-Leland Amendment is a federal statute, a violation of that amendment by agents of the state such as HACH is redressable under § 1983.

[14] We recognize that, in *Thiboutot*, the Court concluded that § 1983 provides a cause of action for violations of federal statutes, not just the Constitution, under color of state law. 448 U.S. at 4-8, 100 S.Ct. at 2504-2506. Since *Thiboutot*, however, the Supreme Court has recognized that not every violation of a federal statute under color of state law is redressable under § 1983. *See Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106, 110 S.Ct. 444, 448, 107 L.Ed.2d 420 (1989). First, no § 1983 cause of action for a violation of a federal statute will lie where "Congress has foreclosed such enforcement of the statute in the enactment itself." *Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 423, 107 S.Ct. 766,

770, 93 L.Ed.2d 781 (1987). Second, § 1983 will not provide a cause of action for a violation of a federal statute where the federal statute in question does not "create enforceable rights, privileges, or immunities within the meaning of § 1983." *Id.* In this case, it is the second exception that is at issue. Accordingly, we must decide whether the Frost-Leland Amendment creates an enforceable federal right within the meaning of § 1983.[2]

The Supreme Court set forth a framework for analyzing whether a federal statutory provision creates an enforceable federal right within the meaning of § 1983 in *Wilder v. Virginia Hospital Association*, 496 U.S. 498, 509, 110 S.Ct. 2510, 2517, 110 L.Ed.2d 455 (1990). The first and most important question under this framework is "whether 'the provision in question was intend[ed] to benefit the putative plaintiff.'" *Id.* (citation omitted). If the answer to the first question is "yes," then the federal statutory provision creates an enforceable right unless (1) it reflects merely a congressional preference for certain kind of conduct rather than a binding obligation on the governmental unit or (2) the interest the plaintiff asserts is too vague and amorphous, such that it is beyond the competence of the judiciary to enforce. *Id.*

---

2. It is important to note that the Plaintiffs are seeking to enforce rights allegedly created by the Frost-Leland Amendment, and not rights secured by 42 U.S.C. § 1437p. In their brief on appeal, the Resident Council's first reply point states that "THE FROST LELAND AMENDMENT PROVIDES THE RESIDENT COUNCIL AND TENANTS OF APV WITH SUBSTANTIVE AND IMPLIED RIGHTS TO A PRIVATE CAUSE OF ACTION UNDER 42 U.S.C. SECTION 1983" Thus, while the district court may have been correct in stating that 42 U.S.C. § 1437p creates enforceable federal rights, the question is whether the Frost-Leland Amendment creates such rights.

The Supreme Court's most recent decision on the issue of whether a federal statute creates an enforceable right within the meaning of § 1983, however, *Suter v. Artist M.*,— U.S.— , 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992), calls into question the continued viability of the framework set forth in *Wilder*. In his dissenting opinion in *Suter*, Justice Blackmun argued that the majority did not even apply the framework set forth in *Wilder*. *See Suter*, — U.S. at —, 112 S.Ct. at 1371 (Blackmun, J., joined by Stevens, J., dissenting). According to the First Circuit, the *Wilder* framework "fell on hard times" in the Supreme Court's *Suter* decision. *Stowell v. Ives*, 976 F.2d 65, 68 (1st Cir. 1992).

The issue raised in *Suter* was whether private individuals had the right to enforce by suit a provision of the Adoption Assistance and Child Welfare Act of 1980—a statute, the Court emphasized, that was enacted pursuant to Congress' spending power. *Id.* — U.S. at —, 112 S.Ct. at 1366. The specific provision sought to be enforced by the plaintiffs in *Suter* required the State—in order to be eligible for reimbursement from the federal government for certain expenses incurred in administering foster care and adoption services—to submit a plan to the Secretary which provided that, prior to the placement of a child in foster care, "reasonable efforts" would be made to prevent removal of a child from his home and to make it possible for the child to return to his home. 42 U.S.C. § 671(a)(15). In deciding whether the provision requiring the State to use "reasonable efforts" created a federal right enforceable under § 1983, the *Suter* Court framed the question as follows:

> Did Congress, in enacting the Adoption Act, *unambiguously confer* upon the child beneficiaries of the Act a right to enforce the requirement that the State make "reasonable efforts" to prevent a child from being re-

> moved from his home, and once removed to reunify the child with his family?

— U.S. at —, 112 S.Ct. at 1367 (emphasis added). The Court then proceeded to analyze exactly what the statute required the State to do. Ultimately, the Court concluded that the language of the statute did not "unambiguously confer" an enforceable right on the statute's beneficiaries. *Id.* at —, 112 S.Ct. at 1370. It stated: "The term 'reasonable efforts' in this context is at least as plausibly read to impose only a rather generalized duty on the state, to be enforced not by private individuals, but by the Secretary [of Health and Human Services] in the manner previously discussed." *Id.*

[15] In this case, we need not decide whether *Suter* "effected a sea change in the Court's approach to section 1983." *Stowell*, 976 F.2d at 68, because even under the *Wilder* framework, the Frost-Leland Amendment does not create a federally enforceable right within the meaning of § 1983. Even if, under the first *Wilder* prong, the residents of APV were the intended beneficiaries of the Frost-Leland Amendment, a straightforward reading of the provision indicates that the Frost-Leland Amendment imposes no "binding obligation on the States." *Wilder*, 496 U.S. at 510, 110 S.Ct. at 2518. Although stated in mandatory terms, the Frost-Leland Amendment is an appropriations rider directed solely to HUD, a federal agency. In our view, Congress, by directing its command to HUD, expressed its intent that HUD — not private individuals such as the residents of APV— should enforce the prohibition against using federal funds to demolish the specified public housing projects.[3]

---

3. In interpreting the Frost-Leland Amendment, this court has already stated that it eliminates only federal funding of demolition, "not state or local financing." *Walker v. United States Dep't of Hous. & Urban Dev.*, 912 F.2d 819 (5th Cir. 1990). The amendment does not,

Indeed, it is difficult to believe that Congress would impose a binding obligation on the states in an amendment to a bill appropriating funds to a federal agency. As the First Circuit recognized in *Stowell*: "when a provision in a statute fails to impose a direct obligation on the States, instead placing the onus of compliance with the statute's substantive provisions on the federal government, no cause of action cognizable under section 1983 can flourish." 976 F.2d at 70.

[16] Our conclusion that the Frost-Leland Amendment does not create federally enforceable rights within the meaning of § 1983 is buttressed by the fact that it was enacted pursuant to Congress' spending power. Indeed, this court has stated that the amendment "is strictly appropriational in nature." *Walker v. United States Dep't of Hous. & Urban Dev.*, 912 F.2d 819, 828 (5th Cir. 1990). And, as a general rule, courts have been reluctant to infer a congressional intent to create private rights under appropriations measures. *See, e.g., California v. Sierra Club*, 451 U.S. 287, 297-98, 101 S.Ct. 1775, 1781-82, 68 L.Ed.2d 101 (1981) (concluding that Congress did not intend to create a federal rights under section 10 of the Rivers and Harbors Appropriation Act); *National Treasury Employees' Union v. Campbell*, 654 F.2d 784, 793-94 (D.C. Cir. 1981) (finding no congressional intent to create a private right of action under § 607(a) of the Postal Service and General Government Appropriations Act of 1979).[4]

---

this court continued, "preclude demolitions generally or reverse HUD's *approval* of the demolitions. Regardless of the sponsor[s'] obvious motivation to derail demolitions, the legislation only withdraws federal appropriations." *id.*

4. Although the courts in these cases specifically addressed claims that Congress intended to create a private cause of action under the federal statute itself, *see infra* Part III.B., in doing so, the courts also discussed the question of whether the appropriations statutes created

In sum, we hold that the Plaintiffs have not stated a cause of action against HACH under 42 U.S.C. § 1983. The statute the Plaintiffs seek to enforce—the Frost-Leland Amendment—is an appropriations measure directed at HUD, a federal agency. It does not impose a binding obligation on public housing agencies such as HACH, and therefore it does not create federally enforceable rights within the meaning of § 1983.

2. *Against HUD?*

[17] As explained above, to state a valid claim under § 1983, a plaintiff must (1) allege a violation of rights secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48, 108 S.Ct. 2250, 2254, 101 L.Ed.2d 40 (1988). The Plaintiffs' § 1983 claim against HUD fails on the second element. In *Broadway v. Block*, 694 F.2d 979 (5th Cir. 1982), we held that federal officials, acting under color of federal law rather than state law, are not subject to suit under § 1983. *Id.* at 981 (citing cases). Because HUD is a federal agency acting under color of federal law, we hold that the Plaintiffs have not stated a claim against it under § 1983.

B. Have the Plaintiffs' Stated a Claim for Which Relief Can Be Granted under the Frost-Leland Amendment?

The Plaintiffs argue that, even if they have not stated a claim for which relief can be granted under § 1983, they

---

federally enforceable private rights. Thus, these cases are relevant to the determination of whether Congress intended to create a federally enforceable right within the meaning of § 1983.

have stated a cognizable claim under the Frost-Leland Amendment itself. They specifically argue that Congress, in passing the amendment, intended to provide the residents of APV with a private right of action against HACH and HUD. For the following reasons, we disagree.

[18,19] Initially, we note that the Plaintiffs carry a heavy burden in demonstrating that Congress intended to create a private right of action directly under the Frost-Leland Amendment. As this court has recognized: "To establish an implied private right of action under a federal statute, a plaintiff bears the relatively heavy burden of demonstrating that Congress affirmatively contemplated private enforcement when it passed the relevant statute." *Victorian v. Miller*, 813 F.2d 718, 721 (5th Cir. 1987) (en banc). Thus, to state a claim under the Frost-Leland Amendment itself, the Plaintiffs must overcome the presumption that Congress did not intend to create a private right of action.[5]

[20] In determining whether Congress intended to create a private right of action under a federal statute, courts rely on the familiar test of *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). Under this test, courts are to consider (1) whether the plaintiffs are within the class for whose *especial* benefit the statute was enacted, (2) whether there is evidence of explicit or implicit legislative intent to create or deny a private remedy, (3) whether a

---

5. The presumption is reversed in the context of claims brought under 42 U.S.C. § 1983. If a federal statute creates federally enforceable rights, privileges, or immunities under the framework set forth in *Wilder*, as modified by *Suter*, then a violation of the federal statute under color of state law is redressable under § 1983 unless the defendant establishes that Congress intended to withdraw such a remedy. *See Victorian*, 813 F.2d at 720-21.

private remedy is consistent with or necessary to the purposes underlying the statutory scheme, and (4) whether a federal remedy is inappropriate because the subject matter involves an area that is primarily of concern to the states. *Id.* at 68, 95 S.Ct. at 2083. Applying this test to the Frost-Leland Amendment, we conclude that there is insufficient, if any, evidence to overcome the presumption that Congress did not intend to create a private right of action under the amendment itself.

1. *Against HACH?*

[21] Once the Supreme Court in *Suter* determined that the provision of the Adoption Assistance and Child Welfare Act of 1980 created no federally enforceable rights against the state agency under § 1983, the Court "quickly" disposed of the argument that the federal statutory provision itself created an implied right of action against the state agency. *See* — U.S. at —, 112 S.Ct. at 1370. The Court recognized that the crucial inquiry under *Cort*, like the crucial inquiry under § 1983, is whether Congress intended to create the private remedy sought by the plaintiffs. *Id.* The Court reasoned that, where Congress does not intend to create federally enforceable rights against a state agency, Congress could not have impliedly created a private cause of action against such an agency. *See id.; see also Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 28 n. 21, 101 S.Ct. 1531, 1545, n. 21, 67 L.Ed.2d 694 ("Because we conclude that [the statute] confers no substantive rights, we need not reach the question whether there is a private cause of action under [the statute]....").

We can similarly dispose of the Plaintiffs' argument that the Frost-Leland Amendment creates a private right of action against HACH. As already explained, *see supra* Part III.A.1., in passing the Frost-Leland Amendment, Congress

intended HUD—not private individuals like the residents of APV—to enforce the prohibition against using federal funds to demolish the specified public housing projects. Because the Frost-Leland Amendment does not create any federally enforceable right against HACH under § 1983, there can be no implied right of action against HACH under the amendment itself. In short, we conclude that Congress did not intend to create a private right of action against public housing authorities such as HACH in passing the Frost-Leland Amendment.

2. *Against HUD?*

[22] We also may dispose "quickly" of the argument that, in passing the Frost-Leland Amendment, Congress intended to create a private right of action against HUD. The First Circuit, in addressing a similar argument—namely, that the Federal Fair Housing Act created a private right of action against HUD—stated:

> [I]t is difficult to understand why a court would ever hold that Congress, in enacting a statute that creates federal obligations, has implicitly created a private right of action against the *federal* government, for there is hardly ever any need for Congress to do so. That is because federal action is nearly always reviewable [under the Administrative Procedure Act] for conformity with statutory obligations without any such "private right of action."

N.A.A.C.P. v. Secretary of Hous. & Urban Dev., 817 F.2d 149, 152 (1st Cir. 1987). Because the obligations imposed on HUD under the Frost-Leland Amendment, like the obligations imposed on HUD under the Federal Fair Housing

Act, are reviewable under the Administrative Procedure Act, the First Circuit's reasoning is applicable. If HUD has failed to comply with command of the Frost-Leland Amendment, the appropriate course of action for the Plaintiffs is to seek review of the agency's action under the Administrative Procedure Act. *See infra* Part III.C. In short, there is no language in the amendment itself indicative of a congressional intent to create a private cause of action against HUD outside of the Administrative Procedure Act.

In addition to the availability of judicial review under the Administrative Procedure Act, HUD points out, the doctrine of sovereign immunity militates against a finding of congressional intent to create a private right of action under the Frost-Leland Amendment. Citing *United States v. Mitchell*, 445 U.S. 535, 538, 100 S.Ct. 1349, 1351, 63 L.Ed.2d 607 (1980), HUD argues persuasively that, because the Frost-Leland Amendment does not expressly waive sovereign immunity, no right of action against it may be implied. *See also Miller v. United States*, 710 F.2d, 656, 668 (10th Cir.) (relying on doctrine of sovereign immunity in refusing to imply a private right of action against the Department of Transportation under the Federal Highway Safety Act), *cert. denied*, 464 U.S. 939, 104 S.Ct. 352, 78 L.Ed.2d 316 (1983). Thus, we hold that Congress did not intend to create a private right of action against HUD when it passed the Frost-Leland Amendment.

C. Are the Plaintiffs' Entitled to Judicial Review Under the Administrative Procedure Act?

Having concluded that the Plaintiffs have not stated a claim for which relief can be granted under § 1983 or under the Frost-Leland Amendment itself, we now turn to the Plaintiffs' final argument in support of the district court's

April 4, 1991 order. In particular, we address the argument that the residents of APV are entitled to judicial review of HACH and HUD's actions under the Administrative Procedure Act (APA). We conclude, for the following reasons, that they are not.

Section 702 of the APA gives certain persons the right to obtain judicial review of particular agency actions. It provides, in pertinent part, that

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof ....

5 U.S.C. § 702. The Plaintiffs cannot obtain judicial review of HACH's actions under § 702, because HACH is not an "agency" within the terms of the statute. The Plaintiffs are not at this time entitled to review of HUD's actions, because HUD has not engaged in and "agency action"— or more appropriately, *final* agency action—within the meaning of § 702.

1. *Of HACH's actions?*

[23] HACH argues that the Plaintiffs could not possibly be entitled to review of its actions under the APA, because it is not an "agency" within the terms of § 702. We agree. In *Vieux Carre Property Owners, Residents & Associates, Inc. v. Brown*, 875 F.2d 453 5th Cir. 1989), *cert. denied*, 493 U.S. 1020, 110 S.Ct. 720, 107 L.Ed.2d 739 (1990), we identified the "APA as a route through which private plaintiffs can obtain federal court review of the decisions of *federal* agencies." 875 F.2d at 456 (emphasis added). We emphasized that the right of review under

section 702 does not give district courts the "jurisdiction to enjoin such nonfederal entities as the Audobon Park Commission." *Id.*; *see also* 5 U.S.C. § 701(b)(1) (defining term "agency" as "each authority of the Government of the *United States*, whether or not it is within or subject to review by another agency") (emphasis added). Because HACH is a nonfederal entity, the district court lacked the power to enjoin it under the APA.

2. *Of HUD's actions?*

HACH and HUD also argue that the Plaintiffs are not entitled to judicial review of HUD's actions under the APA. They argue specifically that HUD has not engaged in any final agency action that is subject to review under § 702. Again, we agree.

[24,25] The term "agency action" under section 702 is broadly defined as "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). In *Lujan v. National Wildlife Federation*, 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990), however, the Supreme Court made clear that "[w]hen, as here, review is sought not pursuant to specific authorization in the substantive statute, but only under general review provisions of the APA, the 'agency action' in question must be 'final agency action.'" *Id.* at 882, 110 S.Ct. at 3185 (citing 5 U.S.C. § 704). Whether agency action is "final," in turn, depends on several pragmatic factors: whether the challenged action is a definitive statement of the agency's position; whether the action has the status of law with penalties for noncompliance; whether the impact on the plaintiff is direct and immediate; and whether immediate compliance is expected. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 150-52, 87 S.Ct. 1507,

1516-17, 18 L.Ed.2d 681 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977).

Applying these pragmatic factors to the case at hand, we conclude that the Plaintiffs do not seek review of any final agency action by HUD. The Plaintiffs are not seeking review of HUD's decision to return HACH's demolition application. Nor are they seeking review of an order or rule that defines the phrase in question under the Frost-Leland Amendment. Rather, at best they are seeking review of HUD's internal administrative interpretation of the Frost-Leland Amendment.[6]

---

6. The Plaintiffs also suggest that they are entitled to judicial review of HUD's failure to prohibit HACH from spending the 1979 modernization funds to study demolition—or more generally, HUD's failure to require HACH to spend the 1979 funds in a particular way, HUD is correct in arguing that no action under the APA will lie. In *Heckler v. Chaney*, 470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985), the Supreme Court held that "an agency's decision not to take enforcement action should be presumed immune from judicial review under 5 U.S.C. § 701(a)(2)" *Id.* at 832, 105 S.Ct. at 1656; *see also Hill v. Group Three Hous. Dev. Corp.*, 799 F.2d 385, 396 (8th Cir. 1986) (holding that HUD's decision not to enforce provisions of Housing Act against private landlords was not reviewable under the APA). "[T]he presumption may be rebutted," the Court continued, "where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Heckler*, 470 U.S. at 832-33, 105 S.Ct. at 1656.

The presumption against reviewability has not been rebutted in this case. Indeed, in its brief, HUD notes that "there are no standards for a court to enforce with respect to HUD enforcement of the [modernization] grant to [HACH]". In fact, the only "enforcement action" that HUD may apparently take with regard to such funds is to revise HACH's modernization budget. *See* 24 C.F.R. 826.12 (1979). Moreover, there are no requirements concerning when such a revision action must be taken. Accordingly, we conclude that the Plaintiffs cannot seek review under the APA of HUD's refusal to require HACH to use the 1979 funds

In *Taylor-Callahan-Coleman Counties District Adult Probation Department v. Dole*, 948 F.2d 953, 957-59 (5th Cir. 1991), this court addressed the question of whether opinion letters issued by the United States Department of Labor constituted "final agency action." We held that such letters did not constitute final action, because they were "threshold determination." *Id.* at 959. We reasoned that the opinion letters did not definitively set out agency policy, did not have the status of law with penalties for noncompliance, did not have an immediate impact on the plaintiff, and did not require immediate compliance. *Id.* at 959; *see also Air California v. United States Dep't of Transp.*,654 F.2d 616, 619-20 (9th Cir. 1981) (holding that an interpretive letter sent by the Chief Counsel of the Federal Aviation Administration was not final agency action).

[26] Like the opinion letters at issue in *Taylor-Callahan-Coleman*, HUD's internal and informal administrative interpretation of the Frost-Leland Amendment is not final agency action. The interpretation does not definitely set out HUD's policy on the issue of what constitutes "demolishing" within the terms of the Frost-Leland Amendment. Moreover, the interpretation does not have the status of law, does not have a direct and immediate impact on the Plaintiffs, and does not require immediate compliance by HACH. Thus, HUD and HACH are correct in arguing that the

---

for modernizing APV.

Furthermore, we note that the Plaintiffs have sought relief with respect to the 1979 modernization funds in a separate lawsuit filed in 1987. *See Allen Parkway Village Residents v. Housing Authority of the City of Houston*, No. H-87-563 (S.D. Tex) (APV I). This lawsuit, which has been stayed by the district court, was filed two years prior to the lawsuit giving rise to this appeal. We trust that the district court will now move to resolve the issues in APV I concerning HACH's use of the 1979 modernization funds.

Plaintiffs have no right of review with respect to HUD's internal administrative interpretation of the Frost-Leland Amendment.

Were HUD to formally define the phrase "for demolishing" under the Frost-Leland Amendment or approve an application by HACH to demolish all or part of APV, the residents of APV would undoubtedly have the right to review HUD's final agency action under § 702 for compliance with the Frost-Leland Amendment. The residents would, in such a case, be entitled to a judicial determination of whether the agency's definition of "for demolishing" complied with the principles set forth by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1988), or whether any federal funds were being expended "for demolishing" APV. As this case now stands, however, HUD has simply not engaged in any final agency action that is reviewable under § 702. Thus, the district court was without power to award permanent injunctive relief against HUD under the Administrative Procedure Act.

IV. CONCLUSION

Because the Plaintiffs have not stated a claim for which relief can be granted and are not, at this time, entitled to judicial review under the APA, we do not reach the question of whether the district court erred in interpreting the phrase "for demolishing" in the Frost-Leland Amendment. *See California v. Sierra Club*, 451 U.S. 287, 298, 101 S.Ct. 1775, 1781, 68 L.Ed.2d 101 (1981) (a ruling that there is no private claim under a federal statute disposes of the case, because a court "cannot consider the merits of a claim which Congress has not authorized"). *Taylor-Callahan-Coleman Counties*, 948 F.2d at 956 (a determination that there is no final agency action under the APA means that there is no

subject matter jurisdiction over dispute). For the foregoing reasons, we **REVERSE** the district court's April 4, 1991 order awarding permanent injunctive relief again HACH and HUD and **REMAND** the case with instructions that the Plaintiffs' complaint be dismissed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
APR 04 1991
Jesse E. Clark, Clerk
By Deputy: /s/ illegible

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RESIDENT COUNCIL OF ALLEN PARKWAY VILLAGE, AN UNINCORPORATED ASSOCIATION, ON BEHALF OF ITS MEMBERS, ET AL.,	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. H-89-292
UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.,	§	
Defendants.	§	

ORDER

Pending before this Court is the defendants, United States Department of Housing and Urban Development ("HUD") and the Housing Authority of the City of Houston ("HACH"), motions to dismiss with prejudice, and the plaintiff's, Resident Council of Allen Parkway Village ("APV"), on Behalf of its Members ("Resident Council"), requests for a declaratory judgment pursuant to 28 U.S.C. § § 2201, 2202, and a permanent injunction and damages pursuant to 42 U.S.C. § 1983.

BACKGROUND

APV is a public housing project built with federal funds in the early 1940's. As originally built, it contained 1,000 units. It consists of two and three-story buildings set on 37 acres bounded by a recently developed park along Buffalo Bayou, downtown Houston, Jefferson Davis Hospital, and Fourth Ward, Houston's oldest black community. The plaintiff seeks a declaratory judgment instructing the defendants that no action can be taken for the actual, physical demolishing of APV, as well as for any actions intrinsic to that demolition. Lastly, the plaintiff seeks a permanent injunction enjoining the defendants from using federal funds for any and all related demolition activities.

HACH was established to provide low income persons with decent safe, sanitary and affordable housing. *See* United States Housing Act of 1937, 42 U.S.C. § 1437 et seq., as amended, and the Housing Act of 1949, 42 U.S.C. § 1441 et seq. It owns and operates APV pursuant to a long term Annual Contributions Contract ("ACC") with HUD for the purpose of providing low-rent housing to persons unable to afford adequate and decent housing from the private market. Under the terms of the ACC, HACH receives federal funds to subsidize low-income housing.

In August 1984, HACH applied to the Secretary of HUD (the "Secretary") for permission to demolish APV because the Secretary's approval is a prerequisite to demolition of federally funded public housing, pursuant to 42 U.S.C. § 1437p(d). The plaintiff filed a brief with the Secretary opposing demolition, arguing that the HACH application for demolition did not meet the requirements of the federal statute and that demolition of APV was not in the interests of the low income residents of Houston.

In 1987, the United States Congress passed and the President signed the Department of Housing and Urban Development--Independent Agencies Appropriations Act of 1988, Public Law No. 100-202, 101 Stat. 1329-213. Section 415 of this Act ("Frost-Leland Amendment") provides:

> [n]one of the funds appropriated by this Act or any other Act for any fiscal year shall be used for demolishing...Allen Parkway Village, 1600 Allen Parkway, in Houston, Texas.

HACH's application was pending before HUD for almost four years before HUD took any action. During that time HACH amended its application at least twice. In August 1988, HUD officials informed HACH by letter that they considered the amended application legally inadequate for several reasons, but did not reject the application. HUD suggested several ways of improving the application so that it could overcome its inadequacies. HUD also informed HACH that the amended application would have to be supplemented by a professional appraisal of the land. The plaintiff asserts that in 1988, the HACH Board authorized the payment of a $20,000 appraiser's fee.

In February of 1989, the Houston city council repealed a 1984 resolution supporting demolition of APV and

instructed HACH to reconsider the wisdom of demolition. On December 5, 1989, HUD informed HACH by letter that the 1984 application to demolish APV was being returned unapproved

The plaintiff asserts that in that same letter, HACH was reminded that because the demolition application had not been approved, HACH had a legal obligation to operate the development as public housing i.e., move low income individuals into the housing project. HUD also informed HACH that federal funds were available for modernization of APV and set a deadline of January 19, 1990, for HACH to inform HUD regarding its decision on future development.

On or about January 12, 1990, HACH submitted to HUD their Comprehensive Plan for Development of the 37-acre Allen Parkway Village Site ("Comprehensive Plan"). This plan called for either new construction or comprehensive rehabilitation of up to 150 units on-site and the remaining units were "slated for removal" or demolished. (Comprehensive Plan p. 7)

In March 1990, HUD requested that HACH take immediate action to furnish a formal application, within 90 days, for approval with respect to any long term modernization, demolition and/or disposition of APV. The plaintiff contends that HACH has not responded to that request.

PROCEDURAL HISTORY

This Court has jurisdiction pursuant to 28 U.S.C. § 1331(a) governing actions arising under the Constitution and the laws of the United States.

The plaintiff filed this suit in January, 1989, and on April 12, 1989, this Court granted the plaintiff a temporary

injunction against HACH. Before the evidentiary hearing in March 1989, the plaintiff agreed to abandon its request for a preliminary injunction against HUD in return for HUD's agreement to keep the plaintiff timely informed of any request for action on APV from HACH.

AUTHORITIES AND DISCUSSION

1. Mootness

The defendants contend that the plaintiff's request for an injunction is moot; the passage of time, the present position of HUD, and the Fifth Circuit ruling in *Walker v. United States Dep't of Hous. & Urban Dev.*, 912 F.2d 819 (5th Cir. 1990), together eliminated any justiciable controversy.

It is well settled that an actual controversy must exist at all stages of federal court proceedings. *See Flast v. Cohen*, 392 U.S. 83 (1967). If events subsequent to the filing of a case resolve the dispute, the case should be dismissed as moot. However, the mootness doctrine must be applied to each of the defendants separately.

The record shows that a justiciable controversy exists under Article III of the United States Constitution. In *U.S. Parole Comm. v. Geraghty*, 445 U.S. 388 (1980), the Supreme Court announced four exceptions to the Article III mootness doctrine. The voluntary cessation exception, is applicable to HUD. Voluntary cessation of illegal conduct will render a case moot only if the defendant establishes that "there is no reasonable expectation that the wrong will be repeated". *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953) quoting *United States v. Aluminum Co. of America*, 148 F.2d 416, 448 (1945). Although HUD has not approved HACH's application for demolition, evidence in the

record suggests that the plaintiff's concern that HUD will aid HACH in the preparation of further applications, which will involve the use of federal funds, is founded. Therefore, the absence of a pending application before HUD eliminates the need for an injunction against HUD, but does not render the case moot.

The evidence shows that although HUD rejected HACH's application for demolition, HACH continues to use federal funds to prepare and plan for the demolition of APV. In this Court's order entered on April 12, 1989, this Court stated, "The utilization of federal funds to study, prepare, or take steps toward demolition constitutes the expenditure of funds 'for demolishing'." The cover letter accompanying the Comprehensive Plan which HACH submitted to HUD states that as of May 1989, HACH "had not been able to identify any non-federal dollars for any demolition-related plans or studies." There is no evidence in this cover letter or the record to date which suggests that any non-federal monies have been identified, yet HACH's Comprehensive Plan "provides for partial demolition of the property.." In fact, HACH no doubt purposefully, avoids using the words demolition or demolishing. The Comprehensive Plan states, "The 850 units which are slated for removal from the 37-acre site will be replaced throughout the City of Houston."

There are live issues in this case as long as HACH fails to use allocated federal funds for their intended purposes, maintenance and renovation of APV, and simultaneously insists on spending the allocated funds on studies that are designed to defeat those purposes. As a consequence, HACH's actions which point to a continuing effort on their part to circumvent the law preserves the case against defendants HACH and HUD. The mootness doctrine is without force or effect. Moreover, this Court has previously ruled that the plaintiff has standing to bring and maintain a cause

of action under 42 U.S.C. sec. 1983. *See* Instrument #37, Order entered April 12, 1989.

2. Declaratory Judgment

The plaintiff argues that the Frost-Leland Amendment prevents HUD and HACH from taking any further steps to prepare, consider, or approve a new application for demolition because any such action by either defendant would involve the expenditure of federal funds.

In *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227 (1937), the Supreme Court upheld the constitutionality of the Declaratory Judgment Act, 28 U.S.C. § 2201, and concluded

> "[w]here there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. " 300 U.S. at 227, 241 (1937).

In this case, there is an actual dispute between adverse litigants and a substantial likelihood that any Court decision will have some effect. Thus, a declaratory judgment is appropriate.

This Court previously defined "for demolishing" as the use of federal funds to study, prepare or take steps toward demolition and it reaffirms that interpretation. HACH is admonished that it is PROHIBITED from spending any federal funds on any activity which promotes, advances,

or explores the total demolition of APV. This would include the expenditure of funds to establish that rehabilitation and renovation of part or all of APV are useless.

To this end, HACH is ORDERED to furnish this Court with an accounting of all expenditures of all federal funds allocated to HACH since 1979. The Court is particularly concerned with any expenditure of part or all of the $10,000,000 allocated for repair and/or renovation of APV. Additionally, HACH is ORDERED to provide to this Court a similar accounting of all funds received by HACH in the form of rent subsidies pertaining only to APV since 1979. This accounting shall include a history of the vacancy rate of APV on an annual basis since 1979 such that this Court may know the difference between the vacancy rate and the annual income derived from rent subsidies.

In *Walker v. U.S. Dept. of Hous. and Urban Dev.*, 912 F.2d 819 (5th Cir. 1990), the Fifth Circuit concluded that the Frost-Leland Amendment in no way amends HUD's substantive obligations regarding the administration of federal housing laws, and thus, is strictly appropriational in nature." *Walker*, 912 F.2d at 828. The Walker court also stated that the "amendment does not preclude demolitions generally or reverse HUD's approval of the demolitions". *Id.* at 829.

Since the amendment does not preclude demolitions generally, reverse HUD's approval authority, or prohibit HUD approval of demolitions, it is axiomatic that HUD retains the right to approve applications for demolitions, including APV. An attempt to prohibit HUD from spending federal funds for such actions would broaden the interpretation of the language that the Fifth Circuit has interpreted narrowly, and ignore the plain language of the amendment. The Frost-Leland Amendment has been construed narrowly to mean that it "only withdraws federal appropriations". *Id.*

It is **ORDERED** that HACH present to this Court within 60 days of this Order a plan to use the federally appropriated funds for the repair and upgrading of part or all of the APV; it is,

ORDERED that the permanent injunction requested is **GRANTED** to the full extent of the Frost-Leland Amendment; it is,

ORDERED that the permanent injunction requested is **GRANTED** to the full extent of the Frost-Leland Amendment; it is,

ORDERED that HUD shall set aside such funds as remain from the $10,000,000 approved appropriation such that these funds are not to be transferred to other projects until further orders of this Court. Any expenditure of these funds shall be approved by this Court. It is further,

ORDERED that HACH shall submit to this Court, under separate cover, an accounting of all expenditures of funds set aside for the repair and renovation of APV as well as all rent subsidies that are now and have been allocated and paid to HACH for the APV apartments.

Finally, it is **ORDERED** that all discovery associated with the 42 U.S.C. § 1983 claims shall be completed within 90 days. This case is set for docket call on September 9, 1991 at 11:30 a.m. Each side is admonished to comply with the Court's procedures manual in meeting this date.

Signed this 3rd day of April, 1991.

/s/ illegible
KENNETH M. HOYT
United States District Judge